

THE FORCE OF THE BRITISH RESTRICTIVE TRADE PRACTICES ACT OF 1956

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INTRODUCTION

The commentator on modern legislation suffers from many handicaps all of which stem from the increasing difficulty experienced in placing legislation in its correct perspective. To portray with accuracy the contribution made to our well-being by many statutes is no simple task; it is fraught with difficulty. For example, the overtones in congressional or parliamentary debates, prior to the adoption of a particular measure, possess a significance which only the most skilled and discerning of political interpreters are in a position to comprehend. Moreover, what the commentator puts into print stands to suffer from those who are able to write on the same legislation years later when controversy has been erased and when the conflict between what was intended by, and what have been the results of, the legislation has invariably been resolved in favor of the latter.

These misgivings have long been sensed; but today, when the elements in society are as diverse as ever and when the process of societal interaction has been accelerated, they must necessarily be accentuated. It is probable that a brief acquaintance with a few truths is all that our writer is permitted to experience and that that is all he can communicate. Silence is not a possible alternative, perhaps rather unfortunately so, because then, at least, no positive errors would be committed.

We are left, therefore, with the necessity of communication, the aim of ensuring that that communication is as close to the objective truth as possible and, finally, the hope that critics will not launch into an attack on the content of our remarks unmindful of the handicap from which we suffer.

One can, in un-Bunyan fashion, choose an easier path: simply record the legislature's debate, discuss the actual statute, examine the decided cases and leave it at that. But, even in such a straightforward approach to legislation and its significance there looms the danger that the very quality of the exposition, perhaps its flat and unexcited tones, will betray an insensitivity towards an important detail that does stand in need of emphasis. The orientation of this approach may be quite wrong and, furthermore, misleading. It follows, therefore, that

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assessing the situational value of any piece of legislation is not to be undertaken with a light heart.

With how much more trepidation must one approach a statute such as the British Restrictive Practices Act, 1956,¹ a novelty among recent British legislation for its establishment of a new court of law charged with grave responsibilities in the sphere of economics! This peculiarly British effort to control cartels falls clearly into that branch of the law school curriculum called "Public Control of Business";² we are at once hurled into a confused world where politics, economics and law are inextricably interwoven, perpetually in conflict and indescribably complex.

Logically and, in each individual's case, intuitively, such a statute conjures up a host of varying thought-responses; our whims of curiosity are inevitably aroused, for here the dynamic variables of politics, law and economics demand our attention. Their interdependency, however, makes it almost a superhuman task to sift from the wilderness of our intellectual impressions those that tell "what the Act is really all about." Let us give an illustration of this predicament in which we are placed. An important element of any inquiry into "what anything is all about" is prediction of the future, or, at least, the pronouncement of some homily which relies heavily on expected developments for the justification of its moral message. This is quite natural. Yet such a quest is pregnant with complications, for "if there is such a thing as growing human knowledge, then we cannot anticipate today what we shall know only tomorrow."³ Prediction both of legal decisions and of the effectiveness of legislation must be constantly subjected to this appraisal.

At this stage the question may be raised, Why all these preliminaries? It is well put. The answer is not simple, but is, in the instance of the 1956 Act, induced by the conviction that it must have been impossible to assess the situational value of the legislation in the year it was introduced and by the continuing conviction that it is still difficult to make that assessment even today. Perhaps it would be as well if, at this stage of the argument, we were to make it plain in what area these difficulties lie. One has to concede that the crucial proposition is the attachment of the British economy to a competition ethic of some kind or other; but, it is far from certain (a) what this attachment is; (b) what is meant by "competition" and what the ethic is;

¹ Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68.

² The writer is referring to the American law school curriculum.

³ Popper, *The Poverty of Historicism* at vi. (1961 ed.).

and (c) what the Restrictive Practices Act or, for that matter, the earlier Monopolies Act of 1948⁴ has to do with the problem.

To illustrate this thesis, one need only draw attention to the fact that it is far from clear (1) what was the intention of the Government in introducing the measure; (2) what the wording of the Act was designed to effectuate; and (3) how to delineate satisfactorily the Restrictive Practices Court's conception of its mission.

The clue to these several mysteries is not impossible to light upon. Whither that clue will lead us is another matter altogether; for it is at this later stage of our intellectual journey that real controversy arises. Now the clue is provided by an appreciation of what the concept of competition means in Britain which, in turn, requires an awareness of the unique peculiarities of Britain's post-war economy and of the various endeavors on the part of British people to try to improve their economic position.

Enough has now been said to put anyone on guard against re-interpreting the British problem of restrictive trading practices and the solution that Britain has sought to achieve in terms with which he is more familiar; it would, for example, be particularly fatal to compare, without more, the 1956 Act with the various measures in the United States introduced to protect and foster the ideal of competition. To give one example, the criterion of illegality of restrictive practices is framed in quite different language in the British legislation;⁵ to give a second, the excuses that may be offered in mitigation of restriction are a peculiar combination of British economic policies both determinate and indeterminate.⁶ A not dissimilar combination is to be found in the 1948 Act⁷ already referred to, but nothing resembling it can be discovered in the pertinent American statutes. Further discrepancies will be noted below; meanwhile, it will suffice to quote the words of a member of the British cabinet on the not unrelated subject of the British approach towards the monopoly problem:

If we [i.e., the United Kingdom] join the Common Market we may have to make certain changes in our monopolies legislation. Broadly, the approach to monopolies in the Treaty of Rome⁸ is, like ours, the control of abuse of monopoly power rather than the control of monopoly as such.⁹

⁴ Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948, 11 & 12 Geo. 6, c. 66.

⁵ Section 21.

⁶ Section 21(1)(a) to (g).

⁷ Section 14.

⁸ Article 86.

⁹ Mr. Henry Brooke in the House of Commons. See *The Times* (London), Feb. 15,

THE ENVIRONMENT OF THE ACT

So that we may better appreciate how stands "competition" in Britain, though we risk being somewhat controversial, let us now briefly examine the salient features of British post-war economic history. Materially exhausted but spiritually rehabilitated, a country victorious in war is likely to accustom itself only with difficulty to its comparative penury. In part, this explains what happened in Britain at the close of World War II. An ungrudging acceptance of its military commitments entailed a further drain on the already depleted national resources and the commencement of the Cold War did nothing to ease the situation. Heavy taxation was an almost inevitable consequence; in one way or another, the result was a lower level of investment in Britain. Although Britain's welfare state which was substantially enlarged by the post-war Labour Government is, in several respects, less comprehensive than other welfare states in Western Europe, it too had to be paid for. The rather sudden enactment of tax legislation which had the effect of evening out income differences probably contributed—though if it did, it need not necessarily have done so—to a drying up of the sources of investment. For this entire period the Government kept a tight grip on the economic destiny of the country; rationing of foodstuffs and clothes is the feature of post-war Britain housewives remember best. Fear of inflation in a period of comparatively high employment provoked a variety of counteracting policies such as that encouraging dividend limitation. And then, of course, there was the somewhat more dramatic occurrence known as nationalisation.

Objections to the failure of the Labour Government to create what business considered to be the right psychological atmosphere for economic expansion probably contributed to the Conservative Party's victory at the polls in 1951. The present Government has, however, been barely able to improve the overall position, though, of course, materially the Britisher is better off today than he was in 1951. Balance of payments crises have continued and more measures have been resorted to in order to combat inflationary tendencies. These problems remain.

In what way does this post-war drama impinge on Government

1962. Mr. Brooke's remarks occurred in the course of the debate on the Labour Party motion: "That this House deplores the timid and complacent attitude of the Government towards the growth of private monopoly in Great Britain and their refusal to safeguard the public interest by instituting a public inquiry into the proposed merger of Imperial Chemical Industries and Courtaulds." Both the Labour Party's motion and the merger attempt by I.C.I. were defeated.

policy towards monopoly and oligopoly? It is suggested that among the following are some of the relevant points.

(1) The difficulty that the Socialists experienced in coming to terms with a capitalist economy led them to adopt measures which they thought would contribute to the economic good but which industry was reluctant or unwilling to believe would. This should explain the existence of a certain uneasiness as the country moved into the era of the mixed economy; there were fears that nationalisation would become more widespread. This factor tended to put business on good behavior.

(2) The classical aggressiveness of the capitalist was not commonly encountered whilst British industry recovered slowly from the effects of war. Restriction and understandings within industry had been encouraged by the devastating experience of the 1930's; they were both required by the war and by the years of scarcity immediately following.

(3) The caution shown once controls were removed indicated that investment was not necessarily going to increase at a sufficiently quick rate to enable the United Kingdom to compete effectively with modern equipment in the revived world markets.

To sum up, the high degree of cultural unity in Britain in 1945 entailed that few persons, businessmen least of all, were going to be seen to hurt other people's feelings. Such a situation poses a dilemma for a society which is both intent on economic advance and, despite superficial class barriers, egalitarian in outlook. Now that the Conservatives have been attempting to create conditions where their brand of expansion can take place, the country has not been able to make the correct adjustment or, at least, to adjust at a satisfactory rate.

Given the complex nature of British society, it was to be expected that, when a government was tempted to have recourse to legislation to boost national economic achievement, that government would not identify itself too closely with an ethic, such as competition, without making due allowances for political desires manifestly inconsistent with that ethic. This is, perhaps, the most important general caveat that requires to be lodged in connection with British policy towards monopoly and restrictive trading practices. It illustrates the workings of British political pragmatism and is in the tradition of empiricist philosophy. Some may scorn such Fabian tactics,¹⁰ shout

¹⁰ Fabian tactics here, of course, refer to the policies made famous by the Roman statesman, Quintus Fabius Maximus, and not to any of the ideas promulgated by G. B. Shaw and his entourage.

"Britain needs more competition quickly," and label present tactics "defeatist"; yet, as one writer has recently commented—surely correctly:

The British capacity to muddle through reflects a national distaste for root and branch change, grounded in an intuition of the complexity of truth and the necessity for considering any changes which may be proposed in terms of realities rather than of abstractions.¹¹

Furthermore, any critic of British policy should bear in mind that the price of a mistake in that policy in Britain is very great, as the author of "American Capitalism, The Concept of Countervailing Power" has admirably demonstrated:

[O]ne of the profound sources of American strength has been the margin for error provided by our well-being. In the United Kingdom, especially in modern times, there has been little latitude for mistakes. Government management of economic affairs has had, accordingly, to be far more precise than it has ever been with us. An average Congress occupying the House of Commons and functioning in accustomed fashion would, on numerous recent occasions, have brought about a fairly prompt liquidation of what remains of the British Empire.¹²

The extent to which these philosophical and political grounds for caution can be adjudged correct should be borne in mind as we enter into a consideration of the operation and force of the 1956 British Act. This, naturally, requires personal decisions as to what is considered desirable for Britain. Change, yes, but what kind of change? And how is it to be brought about?

In order that it may be easier for a foreign student of Britain's monopoly and restrictive practices laws to appreciate the importance of these preliminary observations, let us now refer to views of the Government, the public and industry on matters which relate, with varying degrees of directness, to Britain's competition laws.

First, there are the words of a member of the Government:

Britain's need today as a commercial nation is a mood of brash, almost Victorian, self-confidence . . . Too long the associations of employers and employed have put the main emphasis on protection and security, fighting against competition, lest the weaker go to the wall, fighting against redundancy, as though a man who lost one job should not expect to find a better one. What we need is more opportunity, not more security; open doors to the entry

¹¹ Goyder, *The Responsible Company* 11 (1961).

¹² Galbraith, *American Capitalism, The Concept of Countervailing Power* 106 (Sentry ed., 1962).

of our own competition, not shelter against the competition of others.¹³

Second, there is what the consumer feels. Two separate areas of economic controversy have been chosen. The Lloyd Jacob Committee on Resale Price Maintenance¹⁴ reporting in 1948 made a special effort to discover what shoppers thought about fixed retail prices. These shoppers were reported to have said:

In the normal shopping round it is a convenience to know in advance what an item or group of items would cost and that it made it easier to plan and check household expenditure.¹⁵

Of the attitude of the public towards the future of the state-run British railways, a newspaper columnist had this criticism to make:

It must be admitted that the modern State encourages this divorce of price from cost. The nationalised industries are set up with the injunction to provide an economic, efficient, adequate and properly co-ordinated service. These adjectives open the way to a real free-for-all . . . Of course, if a public service is supplying people at a loss you can say it is not economic, you can even say it is not efficient. But if the railways shut down an unremunerative branch line you can say it is not providing an adequate service as long as some people want to use it or even may in the future want to use it.¹⁶

Both the Government and the consumer are deeply affected by their rational desires for economic stability, adequacy of supply and efficiency. When these conflict, as they often do, and when it is seen that they conflict, the awful contradictions and noble paradoxes of British society are exposed for all to see.

Viscount Chandos, the chairman of Associated Electrical Industries, has recently injected into these social and economic debates, a view—undoubtedly shared by a substantial number of British business-

¹³ Mr. Enoch Powell. See *The Sunday Times* (London), May 13, 1962.

¹⁴ Cmd. No. 7696 (1948).

¹⁵ The future of individual resale price maintenance is extremely uncertain in Britain at present. There are persistent rumors that the Government intends to proscribe it. See *The Sunday Times* (London), May 27, 1962. The debate on the subject has been a long one. There are two recent Government reports on the subject: Cmd. No. 7696 (1948) and Cmd. No. 9504 (1956). Change in the law was brought about by the Restrictive Practices Act, *infra*. Fuel to the flames of controversy has recently been added by Andrews and Friday's rejoinder to B. S. Yamey's pro-abolition paper, *Resale Price Maintenance and Shopper's Choice* (Hobart Papers, Institute of Economic Affairs, 1960). The reply is P. W. S. Andrews and Frank A. Friday, *Fair Trade: Resale Price Maintenance Re-examined* (1960).

¹⁶ Schwartz, "To Achieve the Larger Social Purpose," *The Sunday Times* (London), May 13, 1962.

men—that the moral leaders in industry set the stamp of their approval on price leadership rather than the cloister (by which he means secret price-fixing) or the jungle (by which he means cut-throat competition).¹⁷

It would not be easy to say what the view of the Government is on an oligopolistic concentration situation where price leadership flourishes; yet, this new problem adds an extra dimension to the perspective from which we view the British response to the call for more competition, and it is as important that it should be remembered as it is the views on resale price maintenance or the future of the railways¹⁸ when we turn to examine the Act itself.

THE QUEST FOR THE SITUATIONAL VALUE OF THE ACT

1. *The Perils of the Conventional Wisdom*

Now that we have indicated in broad outline the methodological and political hazards in impressing the correct situational value on modern economic legislation, *i.e.*, labelling it with the right label, let us turn our attention to the more specific problems of this general type to be considered in connection with the 1956 Act.

First, it is necessary to say a little more about our search for situational value. Anyone today who pursues a search for significance must recognise that the logical assumptions under which he labors may not be duplicated in those persons responsible for the functioning of the institution he is examining. This is surely the point well brought out by that brilliant ex-lawyer, Franz Kafka, in his novel *The Trial*. The use of ordinary rational faculties is, in such a situation, of no avail since the observer and the observed do not understand each other; they do not communicate in the same language. It is quite

¹⁷ "Lords of the Cloister," *The Economist* (London), April 21, 1962.

¹⁸ It may be of some interest to point out that there is fairly clear evidence that the Government has decided that state-run industries must become self-supporting in those cases where they at present are not. If they are already making profits, these are to be increased in order to defray general governmental expenditure. One can point to the following indicia of change:

- (a) The railways. Uneconomic lines are being closed down; moreover, a recent statement from the head of the British Transport Commission suggests that stopping trains outside the commuter range are likely to be reduced and uneconomic freight carriage curtailed.
- (b) The post office. Over the whole country in the coming years, the post office will introduce a system already in operation in some areas, whereby local telephone calls are charged on a time basis.

(The British telephone system is operated by the post office.)

On the introduction into nationalised industries of what may be described as more aggressive "free enterprise" managerial tactics, see Robson, *Nationalised Industry and Public Ownership* (1960), especially the chapter, "Competition and Monopoly."

possible that the fault does not lie with those being observed; it may well be that the totality of the situation is of such a nature that a search for a "logical" explanation of it is out of place.

Ever since western man became familiar with the advantages to be gained from the projection of political symbols, the innocent's quest for their meaning has been ill-starred. They invariably do not represent what the gullible think they represent. This is no doubt true of meetings attended by important persons and held to discuss economic prosperity at a time when that prosperity is threatened. It may appear to the public that the meeting has been called solely in order to agree on the measures most suited to the exigencies of the moment. However, it is more than likely that the real purpose of the meeting has not been to achieve something concrete but rather so that people can see that a meeting has been held, *i.e.*, that the Government, business or the unions are aware of the pressing need for solutions and are mindful of their obligations to the country.¹⁹

Thurman Arnold has made full use of his awareness of these traps when he wrote, in the right tones of cynicism, of the antitrust laws of the United States:

The antitrust laws became the great myth to prove by an occasional legal ceremony that great industrial organizations should be treated like individuals, and guided by principle and precept back to the old ways of competition and fair practices, as individuals were. This was then, and is today, the principle utility of that massive moral philosophy known as antitrust legislation.²⁰

Arnold's view may now be discredited in the United States;²¹ his later role as a forceful administrator of those selfsame laws suggests it ought to be. But, irrespective of this, what of the 1956 British Act? Is it nothing but a beguiling piece of ceremony, part of the folklore of the British mixed economy?

¹⁹ This example is suggested by remarks of J. K. Galbraith in ch. VIII, *Aftermath I*, in his book, *The Great Crash 1929* (1954).

²⁰ Arnold, *The Folklore of Capitalism* 221 (1937).

²¹ This complaint of Engels would presumably be answered too:

In a modern state, law must not only correspond to the general economic position and be its expression, but must also be an expression which is consistent in itself, and which does not, owing to inner contradictions, look glaringly inconsistent. And, in order to achieve this, the faithful reflection of economic conditions is more and more impinged upon. All the more so, the more rarely it happens that a code of law is the bold, unmitigated, unadulterated expression of the domination of a class—this in itself would already offend the "conception of justice."

Quoted Chayes, *The Modern Corporation and the Rule of Law*, in *The Corporation in Modern Society* 29 (Mason ed. 1960).

The answer surely is "no."

In the first place, it is impossible to conceive of interruptions in the operation of the laws—a factor contributing largely to Arnold's youthful doubts.

Secondly, the British attachment to the ideal of control of abuse of power rather than control of power as such surely makes it plain that there is less likelihood of a conflict between what in an economic sense needs to be done and what it is considered by people as a whole should be done. The argument is this. If we seek to control power, we are more likely to be deflected from our proper task of promoting economic health and national well-being by the shibboleths of those who have, in the past, suffered from the exercise of that power but who are, perhaps, not fully acquainted with the change in the character and extent of that power as the economy grows, as society changes.

Thirdly, the Government clearly hoped that the Act would promote competition. The preamble to the statute provides sufficient evidence of this:

An Act to provide for the registration and judicial investigation of certain restrictive trading agreements, and for the prohibition of such agreements when found contrary to the public interest; to prohibit the collective enforcement of conditions regulating the resale price of goods. . . .

In the fourth place, the effect of some of the early decisions of the court has been such as to lead to the voluntary abandonment by businessmen of their registered restrictive agreements. Though the Registrar in his latest report²² concedes that the rate of abandonments has declined, settlements outside the courtroom have contributed to the paucity of decided cases from the period September 1961–June 1962. This indicates that businessmen are certainly not treating the Act lightly; it is reasonable to suppose that this is the state of mind which the Government wished to foster.

In one sense, however, the cynic cannot be fully answered. We have tried to show that the Act is more than a sham and that it has significance in that it has produced effects, but it is perfectly legitimate for someone to complain that "significance" means more than a conglomeration of human actions induced by legislation. They are quite right. Part of the reason why we are induced to say anything is "significant" is that we are convinced that it indicates a step in the right direction. For the word "significant" does more than describe the word to which it is grammatically attached; it may involve the

²² Report of the Registrar of Restrictive Trade Practices covering the period from Jan. 1, 1960 to June 30, 1961, Cmd. No. 1603 (1962).

attribution of moral approval. The point is that we cannot be certain that the effects produced by the Restrictive Practices Act are the right effects. Some, for instance, believe that written agreements have been replaced by the perhaps more pernicious tacit understanding. The Registrar of Restrictive Practices can be counted amongst those of this opinion.²³ Yet others believe that the Act has accelerated a trend towards monopoly in British industry. Both views have contributed to the decision of the President of the Board of Trade to review the working of both the 1948 and 1956 Acts. "This review," declared Mr. Erroll, "will naturally have to cover the growth in recent years in the number of mergers and the implications of this development for the future health of the economy."²⁴

2. *The Act From the Standpoints of Government, Business and Law*

Our classification of the legislation as falling within the area of "Public Control of Business" invites us to consider it from the three standpoints of Government, business and the law. The enactment of the legislation certainly inaugurated something of a revolution; it is an example of something more than piecemeal technology. In what manner, then, did the change manifest itself?

First, the passing of the Act was symptomatic of the added interest of the Government, albeit a Conservative one, in the workings of the British capitalist system. Nevertheless, this change was less revolutionary than it would have been, say, forty years ago. Britain has, after all, several nationalised industries and has, in recent months, established a National Economic Development Council; both of these innovations would have been anathema to Victorian or early twentieth century Conservatives. Concern at the inability of industry to shake itself free both of its depression psychosis and its restrictionist bent in the face of the need for it to develop growth at home partly for the purpose of expanding exports, together with an increasing awareness of the scope and effects of restrictive practices as revealed by the important report of the Monopolies Commission of 1955²⁵ led the Government to take strong action.

From the standpoint of industry, the 1956 Act was naturally somewhat dramatic, but it should be borne in mind that private industry had been subjected to fairly close scrutiny under the Labour Government. Fears that the wielding of monopoly power in some in-

²³ *Ibid.*

²⁴ The Times (London), Jan. 31, 1962.

²⁵ The Monopolies and Restrictive Practices Commission, *Collective Discrimination: A Report on Exclusive Dealing, Collective Boycotts, Aggregated Rebates and Other Discriminatory Trade Practices*, Cmd. No. 9504 (1955).

dustries would lead to artificially low production and thus obstruct full employment²⁶ partly contributed to the first post-war legislation which, in a more direct way than ordinary Government policies would allow, regulated the affairs of private businessmen. This was the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948.²⁷

This legislation has significance in another sense. The Labour Party was then and still is officially committed to a policy of acquiring the means of production of industry, now usually referred to more genteely as "the commanding heights of the economy." This Act of 1948 thus appears as the manifestation of a compromise by a Government with an economic order of things in which that government did not believe but which that government at that time could not or would not replace. As G. D. H. Cole rationalised this unique situation, no matter how hostile in principle the Socialist remains towards capitalism, he cannot, if he is a "gradualist," wish it not to prosper when he is not prepared to take it over.²⁸

The statute established a commission to investigate, not on its own behalf but at the instigation of the Board of Trade, situations where it was thought that one-third of a market had been captured by one industrial bloc, to recommend steps to be taken to end any threat to the public interest thereby disclosed, and also to draw up reports on associated economic matters. No complete definition of the public interest appeared in the 1948 Act but guidance was given as to the economic objectives which were to be considered as in the public interest. These included production, treatment and distribution by the most efficient and economic means; progressive increases in efficiency; the encouragement of new enterprise; full use of men, materials and capacity; technical improvements; the expansion of old and the opening of new markets.²⁹ The Act gives the Board of Trade authority to make orders incorporating any recommendations the Commission might make, but it should be emphasised that under the present law the Board is not bound to accept these recommendations.

By way of contrast, the 1956 Act is a more determined effort to improve the state of industry and it certainly concerns a larger area of the economy. Though it may have seemed to business that the 1956 Act was a naive or disingenuous attempt to discipline the matured

²⁶ These fears were shown to be specious. See Jewkes, "British Monopoly Policy 1944-56," 1 J.L. and E. 1, 2 (1958).

²⁷ 11 & 12 Geo. 6, c. 66.

²⁸ Cole, "The Growth of Socialism," in *Law and Opinion in England in the Twentieth Century* 79, 89 (Ginsberg ed. 1959).

²⁹ Section 14.

adult, reactions were in fact mixed, and many distinctly favorable. It would possibly be a fair comment that it rather depended on how much the individual businessman had to fear. Still, sincere fears have continued to be expressed that the small man will be gradually forced out as a result of the introduction of such a measure.

Since the first cases under the Act were decided, there has been little official business comment. More recently the remarks of Mr. Paul Chambers during I.C.I.'s unsuccessful plan to acquire Courtauld's, and the comments of Viscount Chandos which appear elsewhere in this article, indicate a revival of concern in the relationship between law and monopolies and restrictive trade practices. On the whole, acceptance of the philosophy of "competition" has been aided by the encounter with the "bracing cold shower" of European competition.

Conflict of interest within business is still obvious; most clearly is this so in relation to the compromise law on resale price maintenance enacted by the 1956 statute.³⁰ Under the new law, agreements for the collective enforcement of conditions as to resale prices have been proscribed, but individual enforcement of resale prices is not only sanctioned but is assisted by special legal penalties. In one of the several cases that have reached the courts under this latter provision, "Pete the Pirate" was still fined even though he said he was charging less than the scheduled price for cigarettes because of a recent appeal of the Chancellor of the Exchequer to everyone to reduce prices. It is rumored that vertical price maintenance may soon be ended.

For the lawyer, the 1956 Act is of considerable importance. First, by the establishment of a new court of law to settle problems which are essentially economic in character, the Government has deliberately reversed the trend voluntarily set in motion early this century by the judges themselves of abdicating as much responsibility as they could in controversial social and economic spheres. As the doctrine of Parliamentary Supremacy began to be understood in all of its ramifications, the judges took it upon themselves to disengage the common law from the glare of controversy. The Taff Vale Case decided in 1901,³¹ which was a decision of the House of Lords hostile to trade unions had such profound repercussions—it had no small part in the growth of the Labour Party—that, when the Liberal Government reversed the case by statute in 1906,³² the judges have since rarely announced a politically controversial decision. Of course, the

³⁰ Sections 24-7.

³¹ Taff Vale Ry. Co. v. Amalg. Soc. of Ry. Servants, [1901] A.C. 421.

³² Trade Disputes Act, 1906, 6 Edw. 7, c. 47. This Act gave unions virtual immunity from tort actions.

opportunity in the British system of government for such an event to occur is rare.

The statute's delineation of the vague competition norm,³³ whatever may be its ambiguities and uncertainties, is in marked contrast to the now usually admitted unsatisfactory common law approach to competition as that approach had finally been developed at the start of the First World War. By then it had been decided that it was no tortious conspiracy for businessmen to combine to injure another businessman so long as their predominant motive was not malice but the furtherance of their own economic well-being³⁴ and the means adopted were not unlawful.³⁵ Contemporaneously, it had been held that a party to a restrictive trade practice could not successfully avow that that practice was a contract in restraint of trade unless he proved that the contract was not reasonable from the standpoint of the parties themselves.³⁶ At an earlier stage of the development of the law on restraint of trade, it had been laid down that the restriction must be shown to be reasonable from the standpoint of both the parties and the public.³⁷ By 1914, this dual standard of legality had been abandoned.³⁸

At this what-seems-to-us-unsatisfactory state of the law, the judiciary at the turn of the century appears to have been but little concerned. Lord Coleridge, C.J., refers to some misgivings others may have felt. Touched, as this passage surely reveals, by the spirit of a Herbert Spencer or a Graham Sumner, he, to his own satisfaction, reduces these misgivings to more gentle proportions:

In the hand to hand war of commerce, as in the conflicts of public life, whether at the bar, in Parliament, in medicine, in engineering . . . men fight without much thought of others, except a desire to excel or to defeat them. Very lofty minds, like Sir Philip Sidney, with his cup of water,³⁹ will not stoop to take an advan-

³³ Section 21.

³⁴ *Mogul S.S. Co. Ltd. v. McGregor, Gow & Co. Ltd.*, [1892] A.C. 25.

³⁵ Finally incorporated into the "conspiracy rubric" by *Sorrell v. Smith*, [1925] A.C. 700.

³⁶ *N. W. Salt Co. v. Electrolytic Alkali Co.*, [1914] A.C. 461.

³⁷ *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535.

³⁸ This was not true of the law on contracts in restraint of trade in areas other than restrictive trading agreements.

³⁹ Sir Philip Sidney was one of those legendary figures who enhanced the reign of Elizabeth I. This poet and statesman met his death on the battle-field of Zutphen in the fall of 1585. Resting at the English camp mortally wounded, he called for a drink, being parched with thirst. A bottle of water was brought, but as he was placing it to his lips, a grievously wounded footsoldier was borne past him and fixed greedy eyes on the bottle. Sidney at once handed it to the dying man with the famous words: "Thy

tage, if they think another wants more. Our age, in spite of high authority to the contrary⁴⁰ is not without its Sir Philip Sidneys; but these are counsels of perfection which it would be silly indeed to make the measure of the rough business of the world as pursued by ordinary men of business.⁴¹

The 1956 Act is a far cry from the philosophy of Social Darwinism.

There are two ways in which one can view the decision of the Conservative Government to utilise the independent agency of the law to promote "competition." On the one hand, the fervent admirer of the law will welcome the decision to use it as an instrument of social change.⁴² On the other hand, the objections put forward at the time by a former Labour Solicitor-General and now a High Court judge call for an answer:

The function of a court is not that which is mentioned in the Bill; it is entirely different, namely, to interpret and administer law, and not to make it. The Bill hands over to this court governmental and parliamentary power. All judgments are founded upon law or upon facts, but in this case the decision which really matters will be a decision founded neither upon law nor upon fact. It will be a political and economic decision. . . . The true place of public interest in law is as the foundation and reason for a general rule, which the law then applies. It is not for a judge to conceive what, in all the circumstances, he considers the public interest to be. This is not law; it is the negation of law.⁴³

Since the coming into force of the legislation, the judges have been able to withdraw from this political controversy by their display of integrity and of conscientiousness. Revelation of such traditional qualities is not enough; one looks for dynamic understanding of the problems the judges have to decide. In this connection it is valuable to observe that the Restrictive Practices Court is something of an experimental court, as laymen sit with High Court judges as members of the Bench. And, out of consideration for their brethren on the Bench, the judicial members have abandoned wig and gown for the more mundane dark suit.

For Government, industry and the law, the 1956 Act is a distinct innovation. The decisions of the court tell us what kind of an innovation it has turned out to be. But before we go on to discuss the cases, it is as well that we have in mind a synopsis of the content and the operation of the Act.

necessity is yet greater than mine." Twenty-six days later Sidney was dead. See XVIII *Dictionary of National Biography* 227.

⁴⁰ It is not known to what authority Lord Coleridge was referring.

⁴¹ *Mogul S.S. Co. Ltd. v. McGregor, Gow & Co. Ltd.*, 21 Q.B.D. 544, 553 (1888).

⁴² See, for example, the speech of the Lord Chancellor, in 199 H.L. Deb. 350 (1956).

⁴³ Speech of Sir Lynn Ungood-Thomas, 549 H.C. Deb. 2029 (1956).

SYNOPSIS OF THE ACT

The Act came into force on August 2, 1956. Its effect on the law relating to resale price maintenance has already been mentioned; one other important but subsidiary change wrought by the Act is the amendment⁴⁴ to the previous monopolies legislation.⁴⁵ This involves the reconstitution of the Monopolies Commission and the curtailment in the scope of its inquiries in view of the 1956 Act.⁴⁶

The Act inaugurates a system of registration of restrictive trading agreements,⁴⁷ and sets up the Restrictive Practices Court⁴⁸ to consider the validity of those agreements on the register when these are presented for their judgment by the Registrar.⁴⁹ Failure by a person or a trade association to forward to the Registrar particulars of a registrable agreement may result in their being fined 100 pounds;⁵⁰ punishment by fine or imprisonment is laid down for offences in connection with false statements.⁵¹

The court is composed of High Court judges, appointed by the Lord Chancellor⁵² and also of persons "appearing to the Lord Chancellor to be qualified by virtue of [their] knowledge of or experience in industry, commerce or public affairs."⁵³ There are five judges and not more than ten laymen. The latter at present include a banker, an accountant, a former civil servant, industrialists and trade unionists.⁵⁴

Registered agreements are presumed to be against the public interest; those who seek to support them shoulder the burden of showing that they are, in fact, beneficial on any one of seven stated grounds and, further, that on balance, considering any disadvantage to the public involved, they are not unreasonable.⁵⁵

⁴⁴ By sections 28 to 31.

⁴⁵ This includes, in addition to the 1948 Act, the Monopolies and Restrictive Practices Commission Act, 1953, 1 & 2 Eliz. 2, c. 51.

⁴⁶ There are areas where neither the court nor the commission control the activities of business. For example, under present British law there is no power in any authority to prevent a merger even though this may result in the emergence of a monopoly.

⁴⁷ Sections 1, 6 and 9.

⁴⁸ Section 2.

⁴⁹ Section 1(2).

⁵⁰ Section 16(1).

⁵¹ Section 16(2).

⁵² Three English judges are appointed to the court by the Lord Chancellor; the other two judges are appointed from the judiciaries of Scotland and Northern Ireland. Section 3(1).

⁵³ Section 4(1).

⁵⁴ Boggis, "The Control of Monopoly," 12 *Cartel* 79, 80 (1962).

⁵⁵ Section 21.

Not all agreements of a restrictive nature are registrable. Elaborate rules relating to excepted and exempted agreements are laid down by sections 7 and 8 respectively. Important examples of these special non-registrable agreements are agreements relating to workmen and their hours of work,⁵⁶ agreements relating exclusively to the export of goods from the United Kingdom,⁵⁷ schemes concerned with the rationalisation of an industry and certified as such,⁵⁸ and finally sole agency agreements.⁵⁹ It is important to stress that the Act is only concerned with restrictive practices distorting supply, etc. in the United Kingdom.⁶⁰ The function of determining whether or not an agreement is registrable is reserved not for the Restrictive Practices Court but for the High Court.⁶¹ The problems in this field are obvious. In *Re Austin Motor Co. Ltd.'s Agreements*,⁶² the High Court refused to look behind a system of bipartite agreements between manufacturers and distributors and manufacturers and dealers of motor cars which was, in 1956, substituted for a system of multipartite arrangements that would clearly have been forbidden under the 1956 Act, even though there was probably some truth in the Registrar's complaint that the new agreements depended for their efficacy on mutual arrangements among all concerned. On the other hand, the agreement in *Re Automatic Telephone and Electric Co. Ltd.'s Application*⁶³ was held to be properly registrable. The agreement in this case involved market sharing, but the striking thing about it was its connection with a separate agreement to supply the post office with telephones. The manufacturers argued that the forced registration of their subsidiary agreement would in effect prejudice Crown rights which were protected under the 1956 Act by virtue of the constitutional principle that the Crown is not bound by a statute unless this is expressly stated. The judge disagreed, saying Crown rights would not be jeopardised.

Another matter bearing on the operation of the register has recently been determined. The Restrictive Practices Court has held in *Re Newspaper Proprietors' Agreement*⁶⁴ that it does possess the jurisdiction to consider an agreement which is on the register even though

⁵⁶ Section 7(4).

⁵⁷ Section 8(8).

⁵⁸ Section 8(2).

⁵⁹ Section 8(3).

⁶⁰ Section 6(1).

⁶¹ Section 13(2).

⁶² L.R. 1 R.P. 6 (1957).

⁶³ [1962] 1 Weekly L.R. 596; [1962] 2 All E.R. 207.

⁶⁴ [1962] 1 Weekly L.R. 328; [1962] 2 All E.R. 250.

that agreement was terminated by the parties to it before the court was served with notice of a reference of that agreement by the Registrar. In denying the application of the proprietors, the court acted on pragmatic considerations:

Persons . . . could agree common retail prices; then determine the agreement within three months; then register the agreement; then enter into a fresh agreement; then register the determination; then determine the second agreement, and so on.⁶⁵

Once the court finds an agreement to be contrary to the public interest under section 21, a declaration to that effect is made. An injunction to prevent continuing adherence to the restrictive scheme does not follow automatically.⁶⁶ The court has first to be convinced of the real likelihood of a breach of the law.

The possibly unsatisfactory nature of this approach was indicated in *Re Newspaper Proprietors' Association's and National Federation of Retail Newsagents', Booksellers' and Stationers' Agreement*,⁶⁷ where the court after having announced its faith in the retail federation—"The federation is a responsible body, its members are responsible and law-abiding citizens"⁶⁸—was forced to subject it to an injunction on hearing that a new plan had been thought up to control entry into the retail newspaper business. Diplock, J., added:

We also desire to make it crystal clear, since the object of the scheme is plain, that the court will not regard as a mitigating circumstance the fact that any such person has acted on the advice of lawyers. . . .⁶⁹

One other matter of post-judgment practice has recently been settled. It has been held to be no contempt of the Restrictive Practices Court for members of a trade association to purport to deprive of his offices within that association a fellow member, who had given evidence on behalf of the Registrar against an agreement to which the association was a party, despite the fact that their sole motive was malice.⁷⁰

To complete this portrayal of the procedural aspects to the statute, mention must be made of the power given to the Board of Trade to remove from the register, on the representation of the Registrar, agreements considered to be of no substantial economic significance.⁷¹

⁶⁵ [1962] 2 All E.R. 256.

⁶⁶ *In re Yarn Spinners' Agreement*, L.R. 1 R.P. 118, 198 (1959).

⁶⁷ L.R. 2 R.P. 453 (1961).

⁶⁸ *Id.* at 495.

⁶⁹ *Id.* at 499.

⁷⁰ *In re Attorney-General's Application*, L.R. 3 R.P. 1 (1962), *rev'd sub nom.* Attorney-General v. Butterworth, [1962] 3 Weekly L.R. 819; [1962] 3 All E.R. 326.

⁷¹ Section 12(1).

A short comparison with United States law and practice should serve to bring out some of the more salient features of the British law.

(1) There is not, in Britain, the wide variety of methods available under the antitrust laws for advertising lapses from the competitive norm; all must be decided within one Act.

(2) The system of registration finds no parallel in the United States; a European, however, does not find the system so strange. Registration is provided for under the regulations recently made under the Treaty of Rome to outlaw agreements which have as their object or result the prevention, restriction or distortion of competition. The registration system would appear to have been first introduced by Norway in 1926. The advantages of this method might be expressed in the one word, "publicity."

(3) British law does not treat as criminal breaches of the restrictive practices legislation; instead, parties to an agreement may be placed under an injunction if there is evidence of their intention to continue to abide by that agreement after the court has declared it to be against the public interest.

(4) British legislation does not subject monopolies to the same procedure as it does restrictive agreements. Monopolies continue to be investigated by an administrative body of few powers under the 1948 Act. Absence of comprehensive legislation regulating abuses of market power is, naturally, of great significance.

(5) Again, the variety of agreements exempted from registration including, for instance, sole agency agreements, illustrates the more restricted notions of forbidden conduct under British law.

More important than any of the above differences is the actual content of the substantive law; this is to be found in the decided cases.

SECTION TWENTY-ONE OF THE ACT

Before we examine the eighteen substantive decisions which have, at the time of writing,⁷² been handed down, it is essential that we append a brief word about the framework within which the adjudicative faculties of the members of the court operate, *i.e.*, the considerations that they are to hold uppermost in the determination of cases. This framework is provided by section 21, without doubt the most important section in the whole Act. It will be observed below that section 21 is remarkable not so much for what it contains, but for what it does not contain. It says that all restrictions are presumed to be contrary to the public interest unless it is shown that any of the

⁷² July, 1962.

seven defenses is proved and also that, on balance, the interest of the public is not thereby adversely affected. This sounds simple and straightforward, but how mistaken an impression this is, for how can one indulge in balancing social interests if there is no yardstick by which to weigh those interests, if there is no definition of the public interest?

This remarkable section must be reproduced in full, so important is familiarity with its general pattern, its concepts and its pragmatic assumptions to appreciate the magnitude of the problem set at the beginning of this article, namely, to find the situational value of the Act.

For the purposes of any proceedings before the Court under the last foregoing section, a restriction accepted in pursuance of any agreement shall be deemed to be contrary to the public interest unless the Court is satisfied of any one or more of the following circumstances, that is to say—

- (a) that the restriction is reasonably necessary, having regard to the character of the goods to which it applies, to protect the public against injury (whether to persons or to premises) in connection with the consumption, installation or use of those goods;
- (b) that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods other specific or substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction itself or of any arrangements or operations resulting therefrom;
- (c) that the restriction is reasonably necessary to counteract measures taken by any one person not party to the agreement with a view to preventing or restricting competition in or in relation to the trade or business in which the persons party thereto are engaged;
- (d) that the restriction is reasonably necessary to enable the persons party to the agreement to negotiate fair terms for the supply of goods to, or the acquisition of goods from, any one person not party thereto who controls a preponderant part of the trade or business of acquiring or supplying such goods, or for the supply of goods to any person not party to the agreement and not carrying on such a trade or business who, either alone or in combination with any other such person, controls a preponderant part of the market for such goods;
- (e) that, having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction would be likely to have a serious and persistent adverse effect on the general level of unemployment in an area, or in areas taken together, in which a substantial proportion of the trade or industry to which the agreement relates is situated;

- (f) that, having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction would be likely to cause a reduction in the volume or earnings of the export business which is substantial either in relation to the whole export business of the United Kingdom or in relation to the whole business (including export business) of the said trade or industry; or
- (g) that the restriction is reasonably required for purposes connected with the maintenance of any other restriction accepted by the parties, whether under the same agreement or under any other agreement between them, being a restriction which is found by the Court not to be contrary to the public interest upon grounds other than those specified in this paragraph, or has been so found in previous proceedings before the Court,

and is further satisfied (in any such case) that the restriction is not unreasonable having regard to the balance between those circumstances and any detriment to the public or to persons not party to the agreement (being purchasers, consumers or users of goods produced or sold by such parties, or persons engaged or seeking to become engaged in the trade or business of selling such goods or of producing or selling similar goods) resulting or likely to result from the operation of the restriction.

DECISIONS OF THE RESTRICTIVE PRACTICES COURT

For clarity of exposition, the decisions of the court will be set forth under four headings:

- (a) Agreements relating to the fixing of prices for commodities;
- (b) Agreements incorporating incentives to do business with particular firms;
- (c) Agreements imposing restrictions on selling outlets; and
- (d) Agreements in fulfillment of a market sharing plan.

1. *Agreements Relating to the Fixing of Prices for Commodities*

The court has dealt with this category of restrictive practice more than any other; fourteen of the eighteen cases so far decided involved price fixing.

In *Re Yarn Spinners' Agreement*,⁷³ the minimum price scheme in existence in the cotton industry was alleged by its supporters to confer specific and substantial benefits on the public under section 21(1)(b) by keeping prices stable, by fostering modernisation within the industry, by avoiding the consequences of a price war, by preserving quality, by preventing the emergence of monopoly conditions and also, under section 21(1)(f), by avoiding a substantial rise in

⁷³ L.R. 1 R.P. 118 (1959).

unemployment that would come about from the abrogation of the agreement. The court found none of the benefits under sub-section (1)(b) proved, and although it accepted the fact that the abrogation of the agreement would have a persistent and adverse effect on the level of unemployment, it found on balance that in the national interest this consideration had to be outweighed. To the fore in the court's thinking was the impression that what the industry needed most was compactness. Only, they said, if the industry were made more compact would prices fall and would the industry be able to resist foreign competition. Since the announcement of this epoch-making decision, the Government has been helping the industry to eliminate its excess capacity. The problems in this industry remain, for the Government, out of consideration for the economies of places like Hong Kong, has indicated its unwillingness to use the tariff to protect the home cotton industry. Thankfully, events have shown that the court's fears over unemployment were somewhat exaggerated.

In *Re Blanket Manufacturers' Agreement*,⁷⁴ the court was faced with yet another minimum price agreement. The unique feature of this case was the fact that the scheme had never been put into operation; the scheme was of the "stop-loss" variety, the idea being that the scheme would only come into operation should the industry as a whole experience a period of recession. The court found that the insuperable difficulty facing those who wished to justify the agreement was two-fold: first, the scheme related to too few of the products which the blanket manufacturers made; and second, it was unlikely that in the foreseeable future the kind of recession feared would actually materialise. The court, at the same time, did hold valid restrictions mutually agreed as to the quality of certain blankets being manufactured.

In *Re Wholesale and Retail Bakers of Scotland Association's Agreement*,⁷⁵ where another operative price agreement was encountered, resort was had to the same arguments that were of no avail in the *Yarn Spinners'* case. It was urged that the agreement preserved price stability, prevented the emergence of a monopoly in the bread industry, prevented debasement in the quality of bread and fostered co-operation amongst the members of the Scottish bread trade. The court was singularly unimpressed, saying that there was no reason why the fact of the steady demand for bread should make success in the bread industry any more difficult should the restriction disappear. Price stabilisation without more, the court emphasised, was not a benefit.

⁷⁴ L.R. 1 R.P. 271 (1959).

⁷⁵ L.R. 1 R.P. 347 (1959).

Restrictive practices in the English bread industry—an industry which, in contrast to the Scottish, is largely dominated by four manufacturers—were examined in *Re Federation of Wholesale and Multiple Bakers' (Great Britain and Northern Ireland) Agreement*.⁷⁶ This time the price restriction was expressed in the form of recommended maximum prices; however, the court was inquisitive, investigated how the restriction had in fact operated and concluded that the maximum had been treated as a minimum. The court was particularly critical of the formula which had been employed for arriving at the recommended price. The restriction was found to infringe section 21.

The aim of the restrictions in *Re Federation of British Carpet Manufacturers' Agreement*⁷⁷ was to fix prices on a certain range of carpets; the association sought to justify them on the basis that quality was preserved, price stability was maintained, distribution of carpets was steady and promotion costs were cut to a minimum. The court found as facts that none of these benefits was proved and registered its disapproval once more of the arbitrary manner in which a price charged had been calculated and the level at which the price had been set.

Two aspects of *Re Phenol Producers' Agreement*⁷⁸ need to be set forth. Apart from the usual arguments that abandonment of the price restriction would lead to a reduction both in quality and in the regularity of supplies, the phenol producers introduced a new argument. They argued that abrogation of the agreement would force the price of phenol so low that there would be such a loss of revenue to tar producers that they would, in turn, seek to divert tar from distillation for purposes of making phenol to use as a fuel for which profitable sales could be obtained. The court was not convinced that diversion would follow any reduction in price because there was conflicting expert opinion as to the suitability of tar for use as fuel, the market for tar as a fuel would be uncertain whereas there was an assured market for the products of tar distillation, and it is uncertain what price tar would fetch as fuel—particularly in the face of competition from oil and coal. The second point about this case is the reaction of the court to the frank admission by an important witness called on behalf of the industry that what was taken into account when prices were fixed was what the trade would stand.

In *Re Black Bolt and Nut Association's Agreement*,⁷⁹ the price

⁷⁶ L.R. 1 R.P. 387 (1959).

⁷⁷ L.R. 1 R.P. 472 (1959).

⁷⁸ L.R. 2 R.P. 1 (1960).

⁷⁹ L.R. 2 R.P. 50 (1960).

restriction was upheld on the grounds that a specific and substantial benefit accrued to the "public," in this instance the purchasers of bolts and nuts, in the avoidance, through the system of agreed listed prices, of their having to "go shopping" for the cheapest bolts and nuts amidst the infinite number of varieties available. The court conducted an examination into the state of this industry and came to the conclusion that prices had been fixed at a reasonable level. However, they did express concern at the unscientific manner in which the price was calculated. The court took pains to stress the fact that its decision was no *carte blanche*; should the manufacturers misbehave themselves in the future, the Registrar would be at liberty to return to the court.

The prices which confectioners were recommended to charge in respect of their confectionery and the recommendation itself were examined in *Re Wholesale Confectioners Alliance's Agreement*.⁸⁰ Here the arguments adduced included the ones that the prohibition on cutting prices made it more likely that confectionery would continue to be sold in remote areas where the turnover was not large; that the restriction avoided the disadvantage of having to "go shopping"; and that one important corollary of the restriction was that it prevented disputes in the trade between wholesalers and retailers by neutralising any advantage one side might possess in the process of fixing prices. The court found none of the points proved.

A more sophisticated form of agreement was brought to light in *Re Motor Vehicles Distribution Scheme Agreement*.⁸¹ The background to this case is important. Manufacturers of British motor cars convened, after the illegalisation of collectively enforced resale price maintenance by the 1956 Act, and arranged that each of their franchised dealers was to be permitted to sell the cars made by any of the group at the same rates advantageous to himself. The scheme required its signatories to prescribe the retail prices of their cars and the franchised dealers, in turn, had to meet certain not-very-onerous garage standards. The court held that the entire scheme was an attempt to enforce collectively resale price maintenance and was, therefore, forbidden. Dealing with substantive arguments put forward on behalf of the scheme, the court said that neither the advantage of after-sales service nor the maintenance of a nationwide network of distribution outlets, both of which were said to be effected by the scheme, was sufficient to justify the scheme's retention. After-sales service, the court continued, was but a shadowy advantage which was certainly not "substantial" and any reduction in distribution outlets would not re-

⁸⁰ L.R. 2 R.P. 135 (1960).

⁸¹ L.R. 2 R.P. 173 (1960).

sult in their becoming inadequate. The alleged difficulties that the ascetic Scot might have in purchasing a modern car prompted this sarcastic retort from Diplock, J.:

It must give considerable satisfaction to the lonely crofters of the western highlands to know how often concern for their unique conditions are relied upon in the Restrictive Practices Court to justify restrictions applicable to the whole of the United Kingdom.⁸²

The second price fixing agreement to be upheld was that in *Re Cement Makers' Federation Agreement*.⁸³ In this case the court was, for the first time, faced with an agreement between several parties to deliver a commodity at the same price in any area; the federation, in fact, operated a basing point system. The crucial finding by the court was, that because of the greater security it afforded to their investment, the scheme enabled members to accept a lower return on their capital than the minimum they would require and obtain under free competition, and that, since in the long run in an expanding industry, the price level under free competition would depend on the return necessary to attract investment in new cement works, the scheme had resulted in substantially lower overall prices of cement than would prevail under competition. That difference in the level of overall prices was a substantial benefit within section 21(1)(b) and was not outweighed by any detriments, as none were found.

In *Re British Bottle Association's Agreement*,⁸⁴ *Re Associated Transformer Manufacturers' Agreement*⁸⁵ and *Re Linoleum Manufacturers' Association's Agreement*,⁸⁶ the court took a more orthodox stand; the price restrictions in all three cases were declared contrary to the public interest. An interesting feature of the *British Bottle* case was the fact that the agreement was upset in face of a finding that not only was the industry efficient but also its prices had been reasonable. The last two decisions took into account arguments based on section 21(1)(f), the "exports" clause. In the *Transformer* case, the court dogmatically asserted that level tendering, a practice included in the manufacturers' export agreement, was generally to be disapproved. In the *Linoleum* case, the court was forced to concede that a reduction in prices at home, consequent to the ending of the price agreement, might provoke a foreign government to introduce tariff or even anti-dumping legislation in order to check the supply of cheaper British goods. However, in the instant case, they found that this was unlikely

⁸² *Id.* at 224.

⁸³ L.R. 2 R.P. 241 (1961).

⁸⁴ L.R. 2 R.P. 345 (1961).

⁸⁵ L.R. 2 R.P. 295 (1961).

⁸⁶ L.R. 2 R.P. 395 (1961).

for the seemingly startling reason that the ending of the agreement could not be expected to foreshadow a substantial lowering in the price of linoleum.

This "return to orthodoxy" has been short-lived, for in the most recent case to be decided, *Re Permanent Magnet Association's Agreement*,⁸⁷ a third restrictive price agreement was sustained. The association in this case had to defend a minimum price agreement; to do so it did not urge the support of the agreement as such: it did not argue the desirability and proof of price stability or the avoidance of any alleged economic consequences of cut-price competition. Rather, it argued that the system of technical co-operation—the members agreed to pool patents, exchange technical information and join together in research—was so important to the industry that, as it was likely that the co-operation would end following the abrogation of the price agreement, the price agreement must be allowed to stand. The court was convinced by this argument, being clearly impressed by the achievements of the British magnet industry in the field of research. The court held that technical co-operation had made available to the public improved magnets from a wider field of manufacturers, generally more quickly and sometimes at lower prices than would otherwise have been the case. Though the court admitted the possibility of lower prices if there were no agreement, still it considered that this detriment was outweighed by the benefit the public derived from the continuation of technical co-operation. After these concessions to the industry, it comes as somewhat of a surprise that the court found the association's case under section 21(1)(f), the "exports" clause, not made out.

2. *Agreements Incorporating Incentives to do Business with Particular Firms*

What we have in mind here are discounts and rebates. Though both have been encountered, there has been relatively little discussion of their merits; one can only turn to the cases in which they have been overturned to learn something of the background to the individual decisions. In the *Carpets* case, where quantity discounts were invalidated, these had been made available only to listed wholesalers; these wholesalers were the only persons who could sell certain types of carpets. This restriction on selling outlets was ended also. In *Black Bolt and Nut*, the quantity discounts given to large purchasers were declared contrary to the public interest, the court saying shortly that they were an attempt to create a preferred group of purchasers and, therefore, bad. In the *Motor Vehicles Distribution* case, discounts

⁸⁷ [1962] 1 Weekly L.R. 781; [1962] 2 All E.R. 775.

given to the franchised dealers were held to be of no benefit; the whole scheme in this case was tainted by the court's finding on resale price maintenance. In *Cement*, aggregated rebates were held invalid, and in *Permanent Magnet*, rebates were once more pronounced bad, on the basis, this time, that they were not essential to the price agreement, which the court found promoted technical co-operation.

For the sake of completeness, it should be made known that in the *Carpets* case one of the features of the agreements which distressed the court was the restriction imposed on manufacturers who wished to contract bulk sales or engage in direct selling. The court, then, is not unequivocal on what it considers to be fair trading terms.

3. *Agreements Imposing Restrictions on Selling Outlets*

Restrictions of this type have been met in three cases; in all three the court expressed its disapproval of these agreements by holding them contrary to the public interest.

*Re Chemists' Federation Agreement*⁸⁸ involved an agreement between manufacturers of medicines, wholesalers and retail chemists to the effect that only properly qualified retail chemists would have the right to sell certain kinds of medicines. The category of medicines was quite extensive and included "proprietary medicines." The argument presented was that the agreement sought to protect the public by enabling it to have the benefit of a sale from a responsible person, a benefit within section 21(1)(a) or (b). The court somewhat skeptically replied that there was no guarantee that a chemist's assistant was aware of possible dangers involved in the consumption of certain limited types of proprietary medicines. The argument that the agreement helped to keep in business the small village chemist was dismissed, largely on the insufficiency of the evidence.

In the *Carpets* case, as has already been noted, the system involving a limitation on the number of sellers of carpets of a particular type incurred the disapproval of the court; the court was particularly annoyed by the arbitrariness of the method by which new carpet sellers were selected.

Similar considerations were scarcely revealed in *Re Newspaper Proprietors' Association Ltd.'s and National Federation of Retail Newsagents, Booksellers and Stationers' Agreement*; ⁸⁹ still this restriction on retail selling outlets for London daily newspapers, including such unlikely bedfellows as the "Financial Times" and the "Greyhound Express and Coursing News," was upset. The retailers argued that without the agreement there would be such an influx of new-

⁸⁸ L.R. 1 R.P. 75 (1958).

⁸⁹ L.R. 2 R.P. 453 (1961).

comers into the business that existing newsagents, in order to compete more effectively, would have to curtail delivery services or cease stocking a quality newspaper such as "The Times" which appeared on many newsagents' display stands simply to catch a casual purchaser. The defense was divided, as appeared from the proprietors' argument. They insisted that without the agreement the federation would somehow manage to make entry into the newspaper retail business even more hazardous. The court extricated itself from the difficulties set in its path by a divided opposition in the following fashion. Dealing first with the retailers, the court came to the conclusion that any substantial increase following the abandonment of the agreement in the numbers of retailers was not to be expected, because entry was particularly hard. Newsagency did not pay unless a newsagent built up a delivery service, which was not easily achieved. The court dismissed the contention of the proprietors on the ground that it was not to be expected that the federation and their retail members would breach the Act. This expectation was somewhat dimmed by later developments.⁹⁰

4. *Agreements in Fulfillment of a Market Sharing Plan*

We have already had occasion to refer to a level tendering arrangement in the *Transformers* case; two other cases more clearly illustrate the court's technique.

In *Re Water-Tube Boilermakers' Agreement*,⁹¹ the manufacturers operated a collusive tendering system by arranging who was to receive any contract that was about to be awarded. The "collusion" aspect of this case was never emphasised although the court did stress the importance of co-operation between the various members of the industry, especially since so few large boilers were ever bought and research always needed to be kept up to date. Nevertheless, the court was not prepared to sustain the restriction on this basis, nor was it of the opinion that the scheme was necessary in order to negotiate fair terms with a preponderant buyer which would have been a defense provided by section 21(1)(d). Instead, the court found that in the important export trade, it was vital that as many personnel and offices as possible be maintained abroad, and that this, in fact, was the present situation because of the spirit of co-operation in the industry. Therefore, the system of collusive tendering was not contrary to the public interest.

A territorial dividing device accepted by two co-operative societies was pronounced to be against the public interest in *Re Doncaster and*

⁹⁰ See text *supra*, accompanying note 67.

⁹¹ L.R. 1 R.P. 285 (1959).

Retford Co-operative Societies' Agreement.⁹² This decision was based primarily on the grounds that the possibility of overlapping of services or the establishment of competing shops was too remote, the result being that no substantial benefit was conferred on the public.

A CRITIQUE OF THE COURT'S PERFORMANCE

Most people have been impressed by the strong line which the court has, in its eighteen decisions to date, taken on restrictive practices. Some critics' enthusiasm, however, is tempered by their concern over the four cases—*Water-Tube Boilermakers*, *Black Bolt and Nut*, *Cement*, and *Permanent Magnet*—in which restrictions received the imprimatur of the court. To a foreign observer, particularly an American who is immersed in the study of his own antitrust laws, the four concessions that the court has made to restrictive practices may appear hard to understand. It is now that the purpose of the long introduction to this article should be made known: the aim was a spiritual cleansing, an assertion of the need to examine one's own assumptions in the light of the experiences of others. Concern over the export trade, the need to promote investment and to continue research, and acquiescence in convenience—the four dominant features in *Water-Tube Boilermakers*, *Cement*, *Permanent Magnet*, and *Black Bolt and Nut* respectively—are four varieties of the countervailing social and economic policies we did so much to emphasise at an earlier stage might soften any rigorous pro-“competition” and anti-“restriction” drive by the court. In the four above-mentioned cases, there was not so much a lapse on the part of the court from the standard norm as a not unexpected avowal⁹³ of factors other than “competition” that may solve the equation set by the ideal of economic health. The final refusal in *Yarn Spinners* to take into account the prospect of unemployment simply indicates that, as the equations set by our ideal are not the same in every branch of industry, the dividing factors cannot be expected to be the same.

The contrast between *Yarn Spinners* and *Black Bolt and Nut* is remarkable. In the latter case, merely the avoidance of an inconvenience was deemed to be sufficient to save the agreement, whilst in the former, an increase in unemployment with its consequent dislocation of the economy and human beings was not. However much one may feel that the court in both cases eventually chose the right factors of economic health, it would be wrong not to examine the view that the absence in the legislation of any guide as to the weight to be given to arguments, when these are balanced under section 21, is unfortunate. All the more so, since few would nowadays contend that

⁹² L.R. 2 R.P. 105 (1960).

⁹³ Whether the four occasions were suitable for this avowal is a matter fit for debate.

pain and pleasure can be scientifically measured, so absurd has Bentham's felicific calculus been shown to be.

Section 21 provides the skeptic with a ready target. He may urge that the decisions are solely instances of *quot homines, tot sententiae*; that if consistency among the decisions has occurred, either it has been more apparent than real or more fortuitous than planned. In a sense, these criticisms are well aimed. Consider, for instance, the relationship of the first clause of section 21(1) to section 21(1)(b), the "specific and substantial benefits" clause. The first clause seems to ban all restrictive practices; the second may permit them to enjoy legal immunity if they receive a broad enough interpretation.

Again, it is not easy to evaluate the presumption against restrictive practices contained in the first few lines of section 21. Does the presumption truly make it difficult for defendants to discharge their onus of proof, or is the presumption simply a portion of the framework which is designed to set defendants at a disadvantage but one which is not insuperable? Could it be said that in the *Cement* case, Diplock, J., the then President of the court, viewed the extent of the "adverse presumption" clause more benignly than did Devlin, J., when he was presiding over the court in *Yarn Spinners*, or Russell, J., in the *British Bottle* case?

At the heart of these difficulties surrounding section 21 lies the significance of the whole Act. The puzzle is tangled and there are many possible methods to attack it. The one selected here is suggested by the belief that a large proportion of our difficulties is caused by our incapacity to assess the effect on the outcome of each individual case of whatever guidance the court is afforded by section 21. This is a field of inquiry in which "realists" and "positivists" have vested interests; we will utilise the evidence both could derive from an acquaintance with the Act and the decisions reached thereunder.

The "realist," in arguing that the Act gives virtually complete discretion to the court and that the cases demonstrate this, could construct a case in support of his view thus:

"The decisions demonstrate the reluctance—one might term it the inability—of the court to abandon a largely intuitive approach. The problems with which this court is concerned demand a thoroughgoing knowledge on the part of the judges of the health or otherwise of a whole industry, and it is inconceivable that during this stage of acquiring knowledge, pre-conceptions are not formed which ultimately influence the outcome. In *Yarn Spinners*, a substantial proportion of the lengthy judgment is devoted to an evaluation of the state of the industry; one does not have to read long before one comes to the point where the view is propounded in blunt fashion that the industry should

be made more compact.⁹⁴ Hence, the adverse decision. Only a fool would deny the impact that the words and deeds of businessmen have had on the court. In both *Black Bolt and Nut* and *Cement*, the court states how impressed it was by the marked responsibility shown by the members of the two industries, and in *Permanent Magnet*, praise was showered on the industry's accomplishments in the field of research. As an example of a case where the court's assessments were of a different variety one need only recall the reaction in *Phenol* to the frank admission on the part of one of the witnesses that the criterion for fixing the price was what the trade would bear. Furthermore, the tribunal itself has shown awareness of the cardinal importance of the history of the conduct of an industry in the past.⁹⁵ Even admitting that what the court does inquire into is in compliance with the spirit of section 21, one cannot state that that 'spirit' dictates the orientation of the inquiry. Is not the orientation affected simply by vague notions of hostility and the intuitive common-sense of both the lay and the judicial members of the court?"

The "positivist" might reply:

"No one will deny that the Act leaves considerable discretion to the judges and encourages them to pursue their inquiries into each industry much as they wish; but, nevertheless, these freedoms are limited. In the first place, there is written into section 21 a clear hostility towards restrictive practices; benefits alleged to follow from the operation of restrictions have got to be proved and the burden of proof is a heavy one. The fact of the non-operation of the scheme in the *Blankets* case logically entailed that the scheme be struck down; for if it had never operated, how could it truly be said it conferred benefits? And note that in the *British Bottle* case the findings that the industry was efficient and that its prices had been reasonable were not sufficient to save the price restriction. In the second instance, the fact that the court has, in some cases, decided that defendants have not proved the existence of any benefits (and has, therefore, not had to concern itself with the Registrar's list of supposed detriments) whilst, in other cases, the court has not so chosen to confine its activities, requires an explanation. Does this difference not suggest that the court does adhere to a set of economic values, and, however inadequately these may be formulated, they do, in the court's view, exist?"

Rather than examine these opposing viewpoints, both of which, it is submitted, contain evidence in their favor, it is now proposed that we conclude by attempting to reduce to a set of propositions the cur-

⁹⁴ L.R. 1 R.P. 118, 184 (1959).

⁹⁵ See the *Cement* case, *supra* note 83, at 276, and the *Permanent Magnet* case, *supra* note 87, at 800.

rent state of the law. Even here it should be apparent that our hypothetical debate has not been irrelevant.

(1) The general hostility shown to agreements incorporating restrictions both on outlets and markets suggests that the task confronting anyone who wishes to defend either variety of restriction is almost insurmountable. The facts, as found, in one case involving market sharing, *Water-Tube Boilermakers*, must be deemed somewhat exceptional.

(2) There is a general presumption against the validity of restrictive price agreements. However, if inefficiency does not exist in the particular industry;⁹⁶ if the price charged is reasonable⁹⁷ and preferably fixed scientifically⁹⁸ and independently;⁹⁹ if the responsibility of the leaders of the industry in the past is likely to continue;¹⁰⁰ and, furthermore,¹⁰¹ assuming that the price agreement has been in operation,¹⁰² if that agreement additionally appeals to the court by virtue of some special benefit which the public derives from it,¹⁰³ then the agreement may escape the censure of the court.

(3) The propositions outlined above must be qualified by the possibilities that the economic attitudes of the judges do differ, that awareness of the difference of the problems in a sector where oligopoly prevails in contrast to a sector where it does not has already and will continue to affect decisions, and, finally, that the variations in the respect shown to competitive aggressiveness and individuality are not consistent with the above analysis.

It should by now be clear that the question, What is the force of the British Restrictive Trade Practices Act?, admits of no short or simple answer. Our task will have been achieved if we have managed to narrow the range of our inquiry, and yet, at the same time, have broadened our vision.

⁹⁶ As was not the case in, for example, *Yarn Spinners*.

⁹⁷ As it was found to be in *Black Bolt and Nut* and *Cement* and not to be in *Phenol*.

⁹⁸ The price was not fixed scientifically either in *Black Bolt and Nut* or *Permanent Magnet*. Still, this deficiency was not fatal. Note the words of Mocatta, J., in the *Permanent Magnet* case, *supra* note 95, at 813:

Our concern . . . is with the reasonableness of the prices charged to the public, whether arrived at by accident or design.

⁹⁹ As it was, for example, in *Cement*.

¹⁰⁰ This point was stressed in all three cases where restrictions were upheld. Both the "specific and substantial benefits" clause and the final balancing clause of section 21(1) invite this consideration of the future.

¹⁰¹ In *British Bottle* the agreement was upset although efficiency, reasonableness of price and industrial responsibility could all be said to have been proved.

¹⁰² In the *Blanket* case, it will be remembered, the scheme was invalidated, although it was found to be not unreasonable, simply because it had never operated.

¹⁰³ Such as an incentive to greater investment (*Cement*) or the high quality of research (*Permanent Magnet*).

POSTSCRIPT

Since the draft of this article was prepared, two more decisions relating to price restrictions have been handed down by the court. Both decisions were in favor of the restrictive agreements concerned and appear to support the thesis advanced above that the social interests taken into consideration by the court are considerably broader than a superficial acquaintance with the legislation might suggest as being possible. Once more the validation of restrictions has been accomplished by means of the application of subsection (b) of section 21 (1).

In *Re Standard Metal Window Group's Agreement*,¹⁰⁴ the court sustained an agreed minimum delivered price for standard metal window frames. This agreement had been entered into by the manufacturers responsible for 42 per cent of the national production of such frames. Competition from the other metal window frame manufacturers as well as from the manufacturers of wooden window frames was interpreted as preventing any kind of economic manipulation by the parties to the agreement. In fact the court found that prices agreed by the parties were lower than those that would obtain were the restriction removed. The court was thus impressed by the argument of the need of the parties to exchange detailed costing and technical information and since, in the court's opinion, the continuation of this exchange was dependent on the price restrictions, the restrictions were permitted to continue.

In *Re Net Book Agreement*,¹⁰⁵ the court vindicated an agreement between book publishers in Britain to enforce certain minimum prices for their books. The court found that were this "net book agreement" ended, the number of stockholding bookshops, "the aristocrats of the trade"—Blackwell's of Oxford or Thin's of Edinburgh come to mind—would decline, and the amount of stock held would be less than at present. The court was also of the opinion that, though in a few particular cases prices of books would be lower because of price cutting, the general effect of abrogation of the agreement would be to increase the price of books to the public. A third major finding was that fewer books would be published under competitive conditions. Commented Buckley, J., "There may not be many mute inglorious Miltons about,¹⁰⁶ but if the agreement was ended, there would be more chance of them remaining mute."

¹⁰⁴ [1962] 1 Weekly L.R. 1020; [1962] 3 All E.R. 210.

¹⁰⁵ The Times (London), Oct. 31, 1962.

¹⁰⁶ The reference is to a passage in Thomas Gray's "Elegy Written in a Country Churchyard":

Some village-Hampden, that with dauntless breast
The little tyrant of his fields withstood;
Some mute inglorious Milton here may rest,
Some Cromwell guiltless of his country's blood.